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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 1036

RUSSELL LASH, as Warden of the Indiana State Prison,

Petitioner,

vs.

GEORGE ROBERT BROWN,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI, AND RESPONSE IN OPPOSITION TO RESPONDENT'S CROSS-PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT BROWN'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

A) The Warden Accurately Set Out the Facts Serving As The Basis For His Petition.

Resondent's, hereafter referred to as Brown, ground for opposing Petitioner's, hereafter referred to as the

Warden, petition for a writ of certiorari is that the Warden's argument that the court of appeals exceeded its authority when it remanded the cause to the district court on an issue never presented by either of the parties to the district court or the court of appeals is not supported by the record. This, the Warden submits, as ludicrous.

The district court never decided the issue of the voluntariness of Brown's confession. The district court's order and memorandum are set out in the Appendix to the Warden's Petition at pp. A-15 to A-24. The district court decided only the competency of counsel question and death penalty questions. On appeal to the court of appeals the only issue presented by Brown, in addition to the death penalty issues, was "Was Petitioner denied the effective assistance of counsel, as guaranteed by the 6th and 14th Amendments to the Constitution of the United States, at his post-conviction coram nobis hearing held before the Lake Criminal Court on June 1, 1960?" See Brown's opening brief in the court of appeals, pp. 2-3.

Secondly, eleven (11) pages of The Statement of the Case in Brown's brief on appeal were devoted solely to the competency of counsel issue. See Brown's opening brief in the court of appeals, pp. 8-19. At the top of page 8 appears the caption "Statement of the Facts Relevant To Petitioner's Claim of the Denial Of the Effective Assistance of Counsel." There is no such caption signaling facts pertaining to the voluntariness of Brown's confession. And finally, Brown's first argument in his opening brief in the court of appeals is signaled by the caption "Petitioner's Claim of the Denial of the Effective Assistance of Counsel At His Post-Conviction Coram Nobis Hearing," at p. 19. Brown's first argument in his opening brief in the court of appeals is devoted solely to the issue of Competency of Counsel.

See pp. 19-39. Brown did not present the court of appeals with an issue pertaining to the voluntariness of his confession.

B) Additional Authority.

The recent case of *Procunier v. Atchley*, O.T. 1970, Cause No. 44,8 Cr.L 3057, decided on January 19, 1971, by this Court is dispositive of this case. In this case the court of appeals failed to make the threshold determination that Brown would be entitled to relief if his allegations regarding the voluntariness of his confession were believed. Brown had already had a determination in the state courts of the voluntariness of his confession. Brown's contentions in the district court were that he had discovered new evidence bearing on the voluntariness of his confession and that his court appointed counsel at the State post-conviction hearing was incompetent for failing to uncover this evidence. Brown relies on six (6) factors which he claims would have produced a different result in the state court had they been introduced. Those factors are set out in the decision of the court of appeals. See the Appendix to the Warden's Petition, pp. A-5 to A-9. An examination of those factors clearly shows that even if believed they would not entitle Brown to relief in the district court. Thus, whether this Court accepts the Warden's version of the proceedings in the court of appeals and in the district court or Brown's version, the conclusion is inescapable that the court of appeals erred in remanding the case to the district court for further proceedings.

II

RESPONSE IN OPPOSITION TO BROWN'S CROSS-PETITION FOR A WRIT OF CERTIORARI.

The District Court and Court of Appeals Properly Abstained From Deciding The Death Penalty Issues since Brown Has Not Exhausted His Available State Court Remedies.

Contrary to Brown's assertion, the court of appeals passed on all of the death penalty issues. While specifically noting the *Witherspoon* issue, *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the court of appeals abstained from deciding any of the death penalty issues on the theory that *all the death penalty issues* should first be presented to the Indiana courts. See the Appendix to the Warden's Petition, p. A-12.

The district court and the court of appeals properly abstained from deciding the death penalty issues for Brown's failure to have exhausted available state court remedies. *Boulden v. Holman*, 394 U.S. 478, 484, 485 (1969); 28 U.S.C. §2254.

However, inasmuch as the death penalty issues are already before this Court in other cases, it might be well that this Court assumes jurisdiction of this cause for the purpose of resolving the death penalty issues raised here. After some fifteen (15) years of litigation, this case deserves to be laid to rest with some sort of finality.

Respectfully submitted,

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